

# Finally holding the World Bank accountable?

## Analyzing Jam v International Financial Corporation from a TWAIL Perspective

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[The World Bank \(WB\)](#), a financial institution born in the Bretton Woods Hotel at the end of the Second World War which enjoys far-reaching immunity due to its status as international organisation, must respond to the US justice system. This was the decision issued on February 27, 2019 by the [Supreme Court of the United States \(SCOTUS\)](#) with a wide margin of 7 votes to 1 in the case of [Budha Ismail Jam vs. the International Financial Corporation \(IFC\)](#), which is the [private sector arm of the World Bank Group](#). The main goal of the World Bank is to provide financial and technical support to the so-called “developing” countries, aiming to end poverty. In order to achieve this goal, the WB acts through a few entities, such as its corporation, the IFC, which aims to promote and finance private-sector development projects. For instance, in 2018 alone, the IFC [contributed US \\$ 23 billion to finance these projects](#).

However, this organization also has been widely criticised for the negative impacts of its projects on the environment and on human rights of local communities. [The Office of the Compliance Advisor](#), the accountability mechanism for the IFC, whose mission is to address complaints by people affected by IFC and [Multilateral Investment Guarantee Agency \(MIGA\)](#) projects and to enhance the social and environmental accountability of this institution, have known [185 cases](#) of communities negatively affected by that type of projects, and 30.8% of those cases have been [reported](#) in Latin America. (Cases before the CAO: East Asia and the Pacific (20); Europe and Central Asia (50); Latin America and the Caribbean (57); Middle East and North Africa (7); South Asia (18); Sub-Saharan Africa (33)).

In response to the lawsuit that was supported by the US Department of Justice and by members of the US Congress, the court stated that international organizations such as the WB could be sued before US judges. Given the enormous power that the WB has exercised especially over Global South States, this ruling is groundbreaking and significant for those states and marks a defining moment for the IFC. The SCOTUS decision suggests that the WB Group is not above the law, does not have absolute immunity and must be held accountable for its actions. However, it also opens up other questions due to the double role played by the US government. On the one hand, the US supported the plaintiffs in this case, but on the other hand it has supported projects similar to the one that generated this lawsuit, since it is the main shareholder among the 189 countries that constitute the WB.

**International Organizations: absolute or limited immunity?**

The conflict that gave rise to this decision emerged with the construction of the coal-fired Tata Mundra power plant in Gujarat (India). The WB through its corporation, the IFC, invested US\$ 450 million in this project. This in turn produced [negative impacts](#) on air and water quality and livelihoods for local farming and fishing communities.

The IFC defended itself by invoking the immunity status that is extended to international organizations with the purpose that these entities are able to function and develop their activities independently. In the US the 1945 International Organizations Immunity Act (IOIA) granted International Organizations the same immunity from suit as foreign governments. In 1952, the State Department adopted a more restrictive theory of sovereign immunities, which was codified in the Foreign Sovereign Immunities Act (FSIA). This act gave foreign sovereign governments presumptive immunity from suit, subject to several statutory exceptions, including an exception for actions based on commercial activity with a sufficient nexus with the United States. Under this theory, foreign governments are entitled to immunity only with respect to their sovereign acts, not with respect to commercial acts. In this regard, [the State Department explained that](#) it was adopting the restrictive theory because the “widespread and increasing practice on the part of governments of engaging in commercial activities made it necessary to enable persons doing business with them to have their rights determined in the courts”.

Related to this, [the SCOTUS clarified that](#) “even if an international development bank’s lending activity does qualify as commercial, that does not mean the organization is automatically subject to suit. The FSIA includes other requirements that must also be met. For one thing, the commercial activity must have a sufficient nexus to the United States. (...) For another, a lawsuit must be “based upon” either the commercial activity itself or acts performed in connection with the commercial activity. (...) Thus, if the “gravamen” of a lawsuit is tortious activity abroad, the suit is not “based upon” commercial activity within the meaning of the FSIA’s commercial activity exception”.

In this sense, according to the IFC, it is immune to such law suits because it enjoys the absolute immunity that foreign governments enjoy as well according to the International Organizations Immunity Acts (IOIA). [The IFC contends that](#) “interpreting the IOIA immunity provision to grant only restrictive immunity would defeat the purpose of granting immunity in the first place (...). This would be particularly true with respect to international development banks, which use the tools of commerce to achieve their objectives”. Moreover, [the IFC argues](#) “it would also expose international organizations to money damages, which would in turn make it more difficult and expensive for them to fulfil their missions”.

However, the US court rejected that defense and clarified that neither foreign governments nor international organizations have absolute immunity, even when they are sued for conducting commercial activities, like the coal-fired power plant at the heart of this case. According to the Court, the IFC does not enjoy absolute immunity in U.S. courts. The same approach applies as to governments when they engage in commercial activities, because these can have a significant impact on the lives of many people. The Court highlights that nowadays, immunity is more limited and the IFC is entitled under the IOIA only to the “restrictive” immunity that foreign

governments currently enjoy. In this regard, [the SCOTUS argues that](#) “it is true that under the rules applicable in 1945, the *extent* of immunity from suit was virtually absolute, while under the rules applicable today, it is more limited”. Moreover, the Court states that the IFC’s own charter does not state that the IFC is absolutely immune from suit.

The argument of the SCOTUS is especially striking given that the exception to the absolute immunity status has been pleaded by Global North companies against Global South states. Importantly, in this case the Court used this argument which historically has been problematic for those states, to benefit marginalized communities within them, and sided against the argument of an organization that supports such companies. In this regard, this decision could be defining to certain marginalized groups within Global South states.

In this sense, the ruling has been praised by renowned NGOs such as [EarthRights International](#), who represented the communities in this case along with the legal clinic of Stanford University: [The Mills Legal Clinic](#). They have denounced the serious impacts on human rights of these and [other local communities](#) created by private sector projects funded by the IFC, that are supposed to lead to “development”.

### **The limits of the current accountability mechanism for the IFC**

As it happened in other conflicts such as the [Santurbán Paramo in Colombia](#), in the case of *Budha Ismail Jam vs. IFC* in India, the internal complaint mechanism of the World Bank, the CAO, was also activated to denounce the impacts on local communities arising from projects financed by the IFC. However, the directors of the IFC did not address the recommendations issued by the CAO. In this sense, the decision of the SCOTUS introduced a significant change in regard to the responsibility of such organizations. It submits them to an independent judicial instance, and not only before an internal mechanism whose recommendations are not considered mandatory.

### **Problematizing the scope of the SCOTUS decision from the TWAIL Perspective**

From the [TWAIL \(Third World Approaches to International Law\)](#) perspective, the effects of this ruling are not yet clear. On the one hand, the decision challenges international organizations that have contributed to the continuity of asymmetric relations between the North and the Global South. These deep inequalities have persisted since colonial times but have been reproduced in a postmodern format. Such inequity has in turn implied the radical transformation of ecosystems and forms of life under the powerful narrative of [“development”](#). This is why this sort of projects in the name of “development” tend to radically change and exclude ways of life of local communities that are more harmonious with nature and that challenges [the classical idea of development](#) mainly addressed by the economic growth indicators.

Nevertheless, on the other hand, important questions remain concerning the scope of this precedent, and its influence to stop the continuation of similar projects financed by the World Bank. Although the decision could imply a new window of

opportunity to claim responsibility of international organizations and in particular of development agencies before domestic tribunals that have legally binding force, depending on the regulations on these actors in each country, this decision also could be problematic. This would be the case if this sort of decision by courts situated in the Global North, at the end result in legitimizing rather than questioning [the common 'development' narrative](#). This concern arises given the minimal power by [Global South States](#) on the World Bank in comparison with the power of Global North States like US. In fact, the success of the plaintiffs before US courts was somewhat surprising given the major role the US government plays in running the WB in the first place. The US is the largest shareholder of the World Bank with [16.57% of the shares](#), from which derives the number of votes (385,223 for US) and the percentage of total voting power (15.68% for US). Moreover, every [World Bank president since its inception has been a US citizen](#). In this sense, due to the enormous and evident power that the US has on the WB, they can evidently influence the goals, aims and decisions of this international organization.

It thus remains to be seen whether this decision is indeed a true beginning to advance the decolonization of this type of organizations, whether this sort of decisions can be issued also by courts situated in the Global South and more importantly whether it can question the 'development narrative'. These questions are also connected to the fact that the sovereign immunity argument has been historically problematic for the so-called third world because the original rule of the immunity that they rely on was used by Global North companies to sue Global South States, and from a TWAIL perspective it can be understood as an expression of ['the threat of recolonisation'](#) that has continued to haunt the so-called Third World.

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